ORAL ARGUMENT REQUESTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 14-1135
No. 14-1140

CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 702,

Intervenor.

PRIMARY BRIEF OF PETITIONER/CROSS-RESPONDENT CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioner/Cross-Respondent Consolidated Communications d/b/a Illinois Consolidated Telephone Company certifies as follows:

A. Parties and Amici. The Parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are:

Consolidated Communications d/b/a Illinois Consolidated Telephone Company - Petitioner/Cross-Respondent;

National Labor Relations Board - Respondent/Cross-Petitioner; and

Local Union No. 702 International Brotherhood of Electrical Workers – Intervenor.

B. Rulings Under Review. The ruling at issue in this case is the order of the National Labor Relations Board dated July 3, 2014 in Cases 14-CA-094626 and 14-CA-101495, amending and adopting the November 19, 2013 decision of Administrative Law Judge Arthur J. Amchan in the same matter. The Board's Order shall be filed with the parties' deferred Joint Appendix. The Board's Order is reported at 360 NLRB No. 140, 2014 WL 3051019 (2014).

C. Related Cases. The instant case has not been previously before this court or any other court, and the undersigned counsel is not aware of any other related cases pending in this court or any other court.

/s/ Robert T. Dumbacher
Robert T. Dumbacher
Counsel for Petitioner/Cross-Respondent Consolidated Communications d/b/a Illinois Consolidated Telephone Company

PETITIONER'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and Circuit Rule 26.1, and to enable the Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Petitioner Consolidated Communications d/b/a Illinois Consolidated Telephone Company ("Consolidated"), states that Consolidated Communications Holdings, Inc. is its parent corporation. No other publicly-held corporation owns 10% or more of its stock. Consolidated is engaged in the communications services industry.

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
ALJ	Administrative Law Judge Arthur Amchan
Bd.-Ord.	Citation to Board's Decision and Order dated July 3, 2014
Board	Respondent/Cross-Petitioner National Labor Relations Board
CBA	collective bargaining agreement
Complaint	Consolidated Complaint filed by the National Labor Relations Board against Consolidated Communications d/b/a Illinois Consolidated Telephone Company in the underlying matter.
Consolidated	Petitioner/Cross-Respondent Consolidated Communications d/b/a Illinois Consolidated Telephone Company
Disciplined Employees	Patricia Hudson, Eric Williamson, and Michael Maxwell
GC	General Counsel
GC-Ex.	Citation to the General Counsel's exhibits
Jt-Ex.	Citation to Joint Exhibits
Order	Board's Decision and Order dated July 3, 2014
R-Ex.	Citation to Consolidated's Exhibits
Tr.	Citation to the transcript of the hearing conducted by the ALJ
Union	Intervenor Local Union No. 702 International Brotherhood of Electrical Workers

I. JURISDICTIONAL STATEMENT

Respondent/Cross-Petitioner National Labor Relations Board ("Board") had subject-matter jurisdiction over this action pursuant to 29 U.S.C. § 160. This Court has jurisdiction over this Petition For Review pursuant to 29 U.S.C. § 160(e) and (f). The Board issued its Decision and Order on July 3, 2014. Petitioner/Cross-Respondent Consolidated Communications d/b/a Illinois Consolidated Telephone Company ("Consolidated") timely filed its Petition for Review with this Court on July 14, 2014.

II. STATEMENT OF THE ISSUES PRESENTED

The primary legal issues presented by the Petition for Review are:

1. Whether the Board erred in concluding that the striker misconduct standard applied to Patricia Hudson's conduct?
2. Whether the Board erred in its application of the legal standard in striker misconduct cases to the facts of this case and therefore should be set aside?
3. Whether the Board's determinations that Consolidated violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1), (3), by discharging employee Hudson and suspending employees Michael Maxwell and Eric Williamson are not supported by substantial evidence and therefore should be set aside?
4. Whether the Board's determination that Consolidated violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5), by purportedly

refusing to bargain collectively with the Union is not supported by substantial evidence and therefore should be set aside?

III. STATEMENT OF THE CASE[1]

This is a Petition for Review of the Board's Decision and Order dated July 3, 2014 ("Order"). In that Order, the Board held that disciplinary actions taken by Consolidated against four employees (for endangering and harassing non-striking employees) violated the Act. The Board also held that Consolidated reassigned the job duties of a terminated employee without giving Intervenor Local Union No. 702 International Brotherhood of Electrical Workers ("Union") sufficient notice and opportunity to bargain.

This case arose after a raucous strike in December 2012 at several of Consolidated's locations. As a result of their misconduct during the strike, Consolidated terminated Hudson and suspended Williamson and Maxwell for two days.[2]

After several other charges were dismissed, the General Counsel ("GC") filed a Complaint alleging that Consolidated violated Sections 8(a)(1) and (3) of

[1] Pursuant to FED. R. APP. P. 30(c) and D.C. CIR. R. 30(c), and in accord with the Glossary of Abbreviations, pertinent pages of the record have been cited. A Deferred Joint Appendix will be filed on May 26, 2015.

[2] Hudson, Williamson and Maxwell are referred to collectively herein as the "Disciplined Employees." The discipline of Brenda Weaver also was at issue. Consolidated, Weaver, and the Union settled the Board's allegation that her termination violated the Act [Doc. 1515489], and Consolidated does not seek review of the Board's Decision regarding Weaver's discharge.

the Act by disciplining Weaver (not at issue here), Hudson, Williamson, and Maxwell. The Complaint further alleged that Consolidated violated Section 8(a)(5) of the Act by reassigning the duties of the Office Specialist – Facilities Department position (formerly held by Weaver) and eliminating it without affording the Union an opportunity to bargain. The ALJ conducted a hearing in August and September 2013. On November 19, 2013, the ALJ issued a Decision and Order finding that Consolidated's discipline of Hudson, Weaver, Williamson, and Maxwell violated Sections 8(a)(1) and (3) of the Act. The ALJ concluded it was unnecessary to rule on the alleged Section 8(a)(5) violation in light of his finding that Consolidated would be required to return Weaver to her prior or similar position. Consolidated timely filed exceptions to the ALJ's Decision. On July 3, 2014, the Board adopted the ALJ's Decision and modified it to conclude that Consolidated violated Section 8(a)(5) by reassigning and eliminating the job duties of Weaver's former position without providing the Union sufficient notice and opportunity to bargain.

Consolidated petitions for review of the Board's Decision, and the Board cross-petitions for enforcement. The principal issue is whether the Board erred in finding that Consolidated committed the underlying unfair labor practices.

IV. STATEMENT OF FACTS

A. The Union's Strike

Consolidated is engaged in the communications services industry and maintains numerous facilities in Illinois. Tr. 1211; GC-Ex. 18 (Stipulations) ¶ 24. The collective bargaining agreement ("CBA") between the parties expired on November 15, 2012. GC-Ex. 18 ¶ 2. The parties continued bargaining without an extension of the former CBA and without an agreement. *Id.* On December 6, 2012, the Union notified Consolidated that it would commence a strike that evening. *Id.* ¶ 3; Tr. 1211. The Union picketed several company locations, including its Rutledge facility in Mattoon, Illinois. Tr. 38-39, 41; GC-Ex. 18 ¶ 24. During the Union's strike, Consolidated continued to operate with replacement workers, out-of-state employees, and supervisors. *See* Tr. 859-861, 926-27, 953-55, 1214-15.

B. The Chaotic Strike Line Conditions On December 10

Mattoon Chief of Police Jeffery Branson (called by the GC), testified regarding his arrival to the Rutledge strike line on the morning of December 10:

> "I was upset because the road was so congested. . . . And my first impression when I got out there -- and I told you that I was a little upset with the shift commander because it was very chaotic. I thought that it was out of control and that we needed to get a handle on it. And, again, I told the shift manager these people have to get out of the roadway. They just can't stand there. So that was my first observation. My second observation was when we were -- when the vehicles were leaving -- that brought me concern as the police chief and the safety issue, was the fact that . . . it was so loud, deafening,

> and they were getting as close to the cars as they possibly can ... Within feet -- a foot, two foot at times, and sometimes they were almost touching it . . . I was afraid and I talked to shift manager about this, what we're going to have happen here is that [someone is] going to drive out, get upset . . . and they are going to hit the gas, and they are going to run somebody over. And I said we've got to get a handle on this because that was concern was public safety."

See Tr. 539, 549-51; *see also* Tr. 540 ("(T)here was what I consider chaos in the street" . . . (a)nd at that point in time I considered it ridiculous.").[3]

In addition, Chief Branson testified that he was upset because some of the strikers were engaging in "little Mickey Mouse games," by walking "real slow across the road" in lines of three. Tr. 541. Chief Branson believed that cars were restricted in leaving the facility (Tr. 553-54), as people were "getting too close to cars" and "clearly in the roadway." *See* Tr. 560-63. Indeed, the strike conditions were such that Chief Branson planned to use barricades the following day to keep the strikers out of the road (Tr. 548, 553), and the police department "could have made some arrests that morning." Tr. 575.

C. The Disciplined Employees' Misconduct

During the strike, Consolidated received written and verbal reports of six specific incidents of strike misconduct by the Disciplined Employees: three incidents relating to Hudson ("Conley incident", "Rankin incident" and "Greider

[3] Union representative Brad Beisner admitted upon reviewing the strike line video filmed by Consolidated and Huffmaster, Consolidated's strike security firm, that strikers were in and obstructing the driveway at the Rutledge facility. Tr. 144, 149; R-Ex. 1 at 9:25:05, 9:57:52.

incident"), two incidents relating to Williamson ("Redfern incident" and "Walters incident") and one incident relating to Maxwell ("Flood" incident).[4] *See, e.g.,* R-Ex. 9; Tr. 206-208, 283-85, 329, 358, 384-85, 395, 428-29, 431-33, 474-75, 872, 894-95, 902, 992-94, 1024-25, 1069, 1220-23, 1255.

At the hearing before the ALJ, Consolidated presented eight witnesses, including five non-management employees, that testified to the specific incidents at issue. Despite the existence of other witnesses, the GC presented no witnesses to support the Disciplined Employees' self-serving denials.

As to each incident, the evidence showed:

1. Hudson: Conley Incident

On the morning of December 10, manager Troy Conley drove himself and replacement employee Larry Diggs to a commercial site in a Company truck to perform replacement work on a cell tower. Tr. 859-62, 953-55. Per Conley, as they were driving on state Highway 16 (where the speed limit is 55 miles per hour) (Tr. 659), he heard honking and observed a car driven by Weaver proceed into the left lane beside him. Tr. 863-64. Weaver, in her personal car (Tr. 643), passed Conley and moved into the right lane in front of him. Tr. 864. Next, Hudson, in

[4] None of the Disciplined Employees held any Union position or were on the negotiating team. Tr. 154. Further, no evidence exists that Consolidated took any adverse action against a Union leader, negotiating team member, or any of the approximately 175 striking employees (Tr. 26-28) for engaging in the strike. Thus, this is clearly not a case of discriminatory intent.

her personal car (Tr. 829-30), came into the left lane, passed Conley, and "proceeded parallel" to Weaver. Tr. 865. Conley saw some "hand motioning going on by [Hudson]," and both immediately slowed their cars down. *Id.* Hudson and Weaver continued to drive slowly and parallel to each other. Tr. 865-66. In attempting to pass, Conley moved into the left lane, but Hudson would not move from the left lane. *Id.* Conley subsequently returned to the right lane behind Weaver. *Id.* Conley testified: "It became obvious to me when [Hudson] passed me, the hand motion started, both cars made a very obvious slow down in traffic. That's when I started feeling trapped. When I came into the left lane to pass and was not allowed to at that slower speed, I was feeling very harassed at that point. It was obvious what was happening." Tr. 909-10.

As a result of Hudson's and Weaver's delay tactics, cars began stacking up in the flow of traffic. Tr. 866. As the cars lined up, Hudson pulled into the right-hand lane and allowed other cars to pass. *Id.* As cars began to pass, Conley moved into the left lane to pass, but as he got up to Weaver, Hudson pulled to the left and "cut [him] off and slowed down again," forcing Conley to slow down. *Id.* Conley returned to the right lane behind Weaver, who also had slowed down. Tr. 866-67. Conley testified that he "absolutely" believed Hudson intentionally cut him off. Tr. 866; *see also* Conley cross-examination testimony (Tr. 914 ("I was in

the left lane. [Hudson] was in the right lane. [Hudson] swerved back in front of me in the left lane."), 915 ("[Hudson] was trying to block me in on the pass.").

In an attempt to escape Hudson and Weaver, Conley turned off the highway and proceeded by an indirect route to his work destination. Tr. 867-68; *see also* JT-Ex. 9; R-Ex. 6; Tr. 958. Conley used this indirect route because he felt "very harassed" and was "trying to avoid conflict." *See* Tr. 868-70.

Replacement employee Diggs corroborated Conley's account by testifying that both Weaver and Hudson "slowed down at a fairly fast pace" and drove parallel to each other "to block us from going at the normal speed that we were trying to travel at." *See* Tr. 954-58. Diggs further testified that Hudson pulled into the left lane and slowed down as Conley proceeded in the left lane such that Conley applied his breaks. Tr. 958. Taken as a whole, Diggs' testimony was that if Conley had not been paying attention, an accident would have occurred. Tr. 957, 962.

Although Hudson and Weaver admitted to targeting Conley, they attempted to excuse their dangerous driving on a public highway by making the outlandish argument that they were engaged in ambulatory picketing. Tr. 592-93, 610-11, 656, 767, 784, 828, 833-34. The claim has no merit because Hudson and Weaver admitted they both were in front of Conley on Highway 16 (Tr. 614-15, 657-58, 661, 778-780, 851), and the Board found that they were in front of Conley and

Diggs. Bd.-Ord. 8. Indeed, the Board discredited Hudson's and Weaver's claims that Conley never was in the left lane attempting to pass Hudson and that Hudson did not block him from passing. Bd.-Ord. 7-8; Tr. 617, 850. Further, Hudson admitted the incident occurred on a public highway, approximately three miles from the Rutledge facility and the corporate office she and Weaver allegedly intended to picket, while they were driving in the opposite direction from that office. Tr. 796-99. Union representative Beisner confirmed that the incident did not occur near a picket line. Tr. 153-54.

Additionally, despite their claim that they were engaged in ambulatory picketing, when Conley turned off Highway 16, neither Hudson nor Weaver followed Conley to the corporate jobsite. Tr. 663, 667-68, 780-81, 839. Purportedly, once Conley pulled off, both Hudson (in her car) and Weaver (in her car), without communication between them (as Hudson did not have a cell phone), simultaneously decided their "ambulatory" picketing was over and returned back the way they came. Tr. 616-17, 663, 765, 774.

2. Hudson: Rankin Incident

Manager Kurt Rankin testified that as he was leaving the Rutledge premises in his car on December 10, he approached the strike line and waited for the Huffmaster security guard to direct him through the line. Tr. 454-56. Rankin saw Hudson's car, which had been on the grass bordering the roadway, go into motion.

Tr. 456, 465-66. As Rankin left the facility and attempted to drive down the road, Hudson's car cut in front of him, and as they proceeded down the road, she "stop[ped] the brakes, move[d], stop[ped] the brakes" so that he was continually moving at a slow speed controlled by Hudson. Tr. 466. Rankin, hoping to "get out of this situation," considered taking the first left into Pilson's auto dealership but could not do so because a car was coming out of its parking lot. Tr. 467. Instead, Rankin "tried to speed up and go around" Hudson, but she swerved into the left lane. Tr. 468. Rankin returned to his lane and eventually passed her after putting his truck in four-wheel drive and driving through a ditch, but not without Hudson again attempting to block him from passing by swerving into the left-hand lane. Tr. 468, 470-71.

Three independent, non-supervisory witnesses, Jonell Rich (a friend of Hudson), Bernice Dasenbrock, and Tara Walters- all of whom viewed the incident from the second floor of the Rutledge building- corroborated Rankin's account that Hudson impeded his progress and swerved to keep him from passing. Tr. 137, 1022, 1027-28, 1114, 1116-18, 1122-23, 1125, 1171, 1173-74.

Other than Hudson's and Weaver's self-serving denial, no evidence contradicts the accounts of Rankin, Rich, Walters, and Dasenbrock. Notably, the GC did *not* call Janece Neunaber, a fellow striker who both Hudson and Weaver claimed was a passenger in Hudson's vehicle along with Weaver. Tr. 620, 786-89.

The GC raised the hypothetical that people were in front of Hudson; however, no witness to the event, including neutral witnesses Rich and Dasenbrock, testified that they saw anyone in front of Hudson. Tr. 484, 1166, 1170-71, 1181-83. Even Hudson testified no one was in front of her. Tr. 842-43.

3. Hudson: Greider Incident

Mattoon employee Sarah Greider testified that as she drove out of the Rutledge driveway on December 10, Hudson pulled in front of her, and Weaver pulled in behind her; Hudson then stopped, causing her to be blocked in. Tr. 1053-55.[5] Greider testified that Hudson "stopped and started and stopped and started" about five to six times. Tr. 1056-57, 1079. Eventually, Greider was able to pull into a parking lot to escape the harassing blockade. Tr. 1055; *see also* Tr. 1092 (ALJ's remark that "(i)t's pretty clear her feeling is that it was done to harass her"). Neutral employee Rich (and a friend of Hudson), who viewed the incident from the second floor of the Rutledge building, confirmed the misconduct, and sent a text to Greider within minutes of viewing the incident saying, "I just saw what Pat Hudson did to you. I can't believe she did that." Tr. 1059, 1116-1122.

[5] Like Rankin, Greider testified that Hudson was "waiting" and then pulled out ahead of her as she exited the parking lot. Tr. 1055-57.

4. Williamson: Redfern Incident

Non-supervisory employee Dawn Redfern testified she drove through the Rutledge picket line at about one to two miles per hour as she was leaving work on the late afternoon of December 10. Tr. 137, 980-83, 986. As Redfern was turning out of the facility, she heard a loud "smack," despite having the radio turned up "loud enough where [she] couldn't be distracted by the picketers." Tr. 987-88. Redfern stopped the car and yelled at striker Williamson, whom she believed knocked in her mirror. Tr. 987, 1007, 1015-16. Redfern was told to keep driving by a security guard, and she did so. Tr. 988. She proceeded to a gas station to compose herself and observed that the mirror was still folded in. Tr. 990-91. Her passenger-side mirror had never folded in before, and after conducting a test on the mirror, she was certain the mirror would only fold in with considerable force. Tr. 990-92, 1013.

Williamson admitted that as Redfern was pulling out, "I made sure she seen my sign and I tried to yell 'scab.'" Tr. 717. Incredibly, Williamson claimed that Redfern's passenger-side mirror "grazed" a standard coach's whistle hanging on his chest, causing the mirror to pop in. Tr. 717, 730-31, 740-42. While initially claiming that Redfern's vehicle was off the roadway/driveway, upon review of the Huffmaster strike video, Williamson admitted that the vehicle was squarely in the driveway as it exited and followed the same pattern and path as those before it.

Tr. 737-40; *see also* R-Ex. 1 at 5:08:07; Tr. 741 (ALJ's remark that video does not show Redfern's vehicle outside driveway).

Williamson's own testimony indicates that he intentionally approached Redfern's vehicle as she pulled out of the parking lot and that either his hand or body knocked it in. Tr. 717, 719, 730-31, 748-50, 987; R-Ex. 5. Chief Branson testified that he observed Williamson "getting as close as he possibly could" to vehicles, and that while he was there, Williamson only begrudgingly complied with his request to "back off." Tr. 565-66.

5. Williamson: Walters Incident

Non-supervisory employee Tara Walters testified that on December 11, as she was alone in the Rutledge parking lot having just crossed the picket line to go to work, Williamson looked toward her, yelled "scab" at her, and grabbed and lifted up his crotch "as a mean, hateful gesture." Tr. 1023-24. The Board adopted the ALJ's finding that Williamson's denial was not credible and that the incident occurred. Bd.-Ord. 11 ("I find that he grabbed his crotch as a hostile gesture directed at her.").

6. Maxwell: Flood Incident

On the morning of December 8, as Frank Fetchak, a non-supervisory replacement employee from Pennsylvania, was beginning his workday at Consolidated's Taylorville Garage, he entered a vehicle driven by his partner

during the strike, replacement worker Leon Flood. Tr. 926-27. As Flood attempted to exit the facility onto a public road, they approached a picket line, which was blocking the vehicle from leaving. Tr. 929-31. Maxwell, who was part of the picket line, intentionally blocked the exit. Tr. 929-33, 952. As the strikers yelled and obstructed Flood's view as he attempted to turn onto the road, Maxwell walked abnormally slowly "between the headlights" and paused to intentionally place a part of his arm on the vehicle's front hood. Tr. 932-33, 952-53. Flood was forced several times to stop the vehicle, slowly inch forward and stop again until Maxwell finally left the front of the van. Tr. 931, 938-39, 953. After leaving the front of the van, Maxwell went to the vehicle's driver side, gave Flood the middle finger and yelled at Flood, "Fuck you, Scab." Tr. 934. Flood's written account corroborates Fetchak's testimony. Tr. 936; R-Ex. 8, 11.

Although Maxwell admitted that he was walking back and forth in the driveway when Flood and Fetchak approached in the van, he claimed that the van "took off like a bat out of hell" at 15 miles per hour and hit him twice. Tr. 499-501, 504, 511-12. Maxwell admitted to not reporting these allegations to the police or going to the doctor and to staying on the strike line for another six to seven hours. Tr. 501, 505, 514, 519-21.

At least six people witnessed the incident: 1) Maxwell, 2) Flood, 3) Fetchak, 4) Warren Evans, a Union officer, 5) Anthony Adkins (a fellow picketer that

Maxwell claimed Flood also hit simultaneously), and 6) other bargaining unit employees on the picket line that morning. Tr. 495-96, 499-500, 502-03, 511, 515-17. However, no witness testified to support Maxwell's account or to discredit Flood's and Fetchak's accounts.

D. Consolidated's Investigation and Disciplined Employees' Refusal To Respond To Consolidated's Request For Their Accounts

On the morning of December 9, Consolidated held a meeting with replacement workers, strike Command Center employees, and Huffmaster representatives to discuss strike procedures. Tr. 486. Shortly thereafter, an email was sent to non-bargaining unit replacement employees attaching Huffmaster's strike guidelines. Tr. 180-81; GC-Ex. 21. The email directed employees to "Report any incidents to the Command Center at [phone number]." GC-Ex. 20. This directive was followed by targets of the misconduct: Conley, Redfern, Greider, and Rankin. R-Ex. 9; Tr. 473, 872-73, 895-96, 988-90, 1059-60.

The first step in Consolidated's plan for investigating and addressing any strike misconduct was for anyone involved in an incident to call the Command Center. Tr. 1216. They were then to fill out an incident report. *Id.* After documentation was gathered, senior management was to review the documentation and address any misconduct. Tr. 1216-17. As set forth at the hearing, Consolidated followed this process in investigating the alleged incidents and disciplining the Disciplined Employees. Tr. 1227-31.

The strike was concluded on the first full shift of December 12, and the employees returned to work on December 13. GC-Ex. 18 ¶ 4; Tr. 49. Upon reviewing the information in Consolidated's possession as to the Disciplined Employees' misconduct, Consolidated suspended Hudson, Weaver, Williamson, and Maxwell pending its investigation. Tr. 1219-22.

As part of its investigation, Consolidated decided to hold a meeting with each employee and their Union representative to get their "side of the story." *Id.* During these meetings, Hudson said nothing and "shook her head," and Williamson said he "was advised not to respond" and "chose not to say anything." Tr. 725, 1284-87; GC-Ex. 23; *see also* Tr. 348-49. Regardless of why they refused to give their side of the story, there is no question that other than Maxwell[6] no disciplined employees provided an explanation for the conduct or even a denial. Tr. 156, 158-59, 161-62, 348-51, 725, 1227-28, 1284-87; R-Ex. 12; GC-Ex. 23.

E. The Discipline

After carefully considering the reports and its investigation, Consolidated terminated Hudson (and Weaver) for harassing replacement workers and creating a public safety risk, confirmed Maxwell's two-day suspension for impeding and threatening the progress of replacement workers, and confirmed Williamson's two-

[6] With the information Maxwell supplied, Consolidated took a number of steps to investigate and determine that Maxwell's claim that Flood was the aggressor was not believable. *See* Tr. 218-19, 222-23, 274-75, 934, 944-45, 1234-36; R-Ex. 11.

day suspension for engaging in coercive and intimidating behavior for the purpose of intimidating employees from coming to work. Tr. 80, 102, 104, 1226-36; GC-Exs. 12(a), 13(a), 14, 15.

F. The Board's Decision

Following a hearing, the ALJ issued his Decision and Recommended Order on November 19, 2013. The ALJ found that Consolidated unlawfully discharged Hudson and Weaver and unlawfully suspended Maxwell and Williamson. The ALJ declined to rule on the Section 8(a)(5) claim. By its Decision and Order dated July 3, 2014, the Board affirmed the ALJ's rulings, findings, and conclusions, modified the ALJ's conclusions to find that Consolidated violated the Act by reassigning and eliminating the job duties of Weaver's former position without bargaining, and adopted the ALJ's recommended Order as modified.

V. SUMMARY OF THE ARGUMENT

The Board's Order that Consolidated violated the Act by disciplining Hudson, Williamson, and Maxwell is contrary to law and not supported by substantial evidence. The Board's Order is riddled with factual errors, unsupported evidentiary determinations, and repeated failures to apply established law. As set forth more fully below, as to Hudson, the Board improperly applied the striker misconduct standard because she was not engaged in protected strike activity during her harassment of Conley. Further, directly impacting and underlying the

ALJ's Decision (adopted by the Board) were the preconceived, erroneous notions that strike lines are "supposed to be intimidating"[7] and that the Disciplined Employees' misconduct must have involved violence or threatened violence to lose protection of the Act. Further, the Board committed clear error when it expressly resolved ambiguities against Consolidated in contravention of established law requiring ambiguities be construed against the GC, who has the ultimate burden of proof.

The Board also improperly placed a duty on the targets of harassment to escape the strikers' misconduct and imposed a duty to report incidents to the police. Additionally, the Order showed a lack of evenhandedness throughout by repeatedly disregarding record evidence without justification, including disregarding employee testimony based on nothing more than speculation and unfounded assumptions that they were "angry" about the strike.

The Board disregarded the bulk of the evidence, which showed that the Disciplined Employees' misconduct reasonably tended to coerce or intimidate employees in the exercise of their protected rights and therefore was sufficiently serious to forfeit protection of the Act. This Court should not sanction the behavior engaged in by the Disciplined Employees and establish inappropriate standards and application of the Act through enforcement of this Board's Order.

[7] Indeed, the ALJ stated this erroneous view at the commencement of the hearing. Tr. 150-51

Accordingly, it should grant Consolidated's Petition for Review and deny enforcement of the Board's Order.

VI. STANDING

Consolidated has standing to seek review in this Court as an aggrieved party to a final order of the Board pursuant to 29 U.S.C. § 160(f).

VII. ARGUMENT

A. Standard of Review

It is well-established that a Court of Appeals will not enforce an order of the Board when "'upon reviewing the record as a whole, [the Court] conclude[s] that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.'" *Tradesmen Int'l, Inc. v. NLRB,* 275 F.3d 1137, 1141 (D.C. Cir. 2002) (*quoting Int'l Union of Electronic, Elec., Salaried, Mach. & Furniture Workers v. NLRB*, 41 F.3d 1532, 1536 (D.C. Cir. 1994)). The Court must not "merely rubber-stamp NLRB decisions[,]" but rather bears the "responsibility to examine carefully both the Board's findings and its reasoning." *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17 (D.C. Cir. 2012) (internal citation and quotations omitted). As this Court has observed: "[T]his court is a reviewing court and does not function simply as the Board's enforcement arm. It is our responsibility to examine carefully both the Board's findings and its reasoning[.]" *Id.* (internal citation and quotations omitted).

B. The Striker Misconduct Standard

In striker misconduct cases, the GC has the overall burden of proving discrimination. *See NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21, 23 (1964); *Shamrock Foods Co.*, 346 F.3d 1130, 1133 (D.C. Cir. 2003); *Pratt Towers Inc.,* 338 NLRB 61, 63 (2002). Initially, the GC bears the burden of establishing a prima facie case that individuals were discharged or disciplined for conduct related to a strike. *See Burnup* at 23; *Shamrock Foods* at 1135; *Pratt Towers* at 63. Thus, the GC must establish that (1) an individual was in fact a striker and (2) the striker was discharged "because of alleged misconduct in the course of" the strike. *Shamrock Foods* at 1136; *Pratt Towers* at 63.

Once the GC establishes its prima facie case, the burden shifts to the employer to demonstrate an honest belief that the individuals engaged in misconduct. *Shamrock Foods* at 1134; *Pratt Towers* at 63. If the employer demonstrates an honest belief, the burden of going forward shifts back to the GC to prove that the strikers did not engage in misconduct. *Axelson, Inc.*, 285 NLRB 862, 864 (1987).

"Once an honest belief is established, it is for the [GC] to demonstrate the strikers' innocence and thus establish that the respondent's conduct is illegal. Moreover, to the extent that there is a lack of evidence on this issue, it must be resolved in favor of the employer, because the [GC] has the burden of proof on this

question." *Id.*; *see also Burnup* at 23; *Shamrock Foods* at 1134; *Schreiber Mfg. v. NLRB*, 725 F.2d 413, 416 (6th Cir. 1984) ("To the degree that there was a lack of evidence ..., this issue [of whether the misconduct actually occurred] should have been resolved in favor of the employer, since the [GC] had the burden of proof on this question. . . . The ultimate burden of proof was on the [GC] to show either that no misconduct occurred or that whatever misconduct did occur was not sufficiently serious to warrant a discharge.").

Consolidated's honest belief is basically uncontested. The evidence showed that after receiving reports from employees, management representatives reviewed the reports, reviewed video, talked to witnesses, provided the accused employees with an opportunity to respond, and formed the honest belief that the Disciplined Employees engaged in misconduct. Tr. 218-19, 274-75, 283-85, 287-89, 329, 358 , 384-85, 395, 428-29, 431-33, 473-75, 864-67, 872, 894-95, 902, 909, 914-15, 943-45, 992, 994, 1024-25, 1054-55, 1057, 1062-63, 1177, 1179-84, 1195, 1220-23, 1227-28, 1230, 1255; R-Ex. 9. Consolidated's investigation easily clears the "inch-high" hurdle (as described by the GC) (Tr. 1349-1350) of demonstrating that at the time it disciplined the employees, it held an honest belief that the disciplined employees engaged in misconduct. *See Universal Truss*, 348 NLRB 733, 734 (2006).

While the ALJ should have found that Consolidated had an honest belief, he merely "assumed" that Consolidated had an honest belief. Bd.-Ord. 12. Regardless of whether he "assumed" or "found" that Consolidated had an honest belief, the burden shifted to the GC to show that either there was no misconduct or that whatever misconduct occurred was not sufficiently serious to warrant the discipline.

Where a striker is found to have engaged in misconduct, the only remaining question is whether the misconduct under the circumstances reasonably tended to coerce or intimidate employees in the exercise of their protected rights. *See General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1314 (D.C. Cir. 1991) (*citing Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enf'd mem*., 765 F.2d 148 (9th Cir. 1985), *cert. denied*. 474 U.S. 1105 (1986)). As the Board held in *Clear Pine Mouldings*: "the existence of a 'strike' in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other

objects of intimidation." 268 NLRB at 1047.[8] Further, "(e)mployee discipline that neither coerces nor discriminates on account of activity protected by the Act does not implicate the Act." *National Conference of Firemen and Oilers, v. NLRB*, 145 F.3d 380, 384 (D.C. Cir. 1998) (*citing NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 254-57 (1939)).

C. The Board's Determination Regarding Hudson's Termination Is Not Supported By The Law Or Facts.

1. Hudson's Impeding Of Conley On A Public Highway Was Not Strike Activity And Should Not Have Been Analyzed Under The Striker Misconduct Standard.

The Board erred in applying a striker misconduct analysis to Hudson's dangerous actions towards Conley on the public highway (Bd.-Ord. 12), as this conduct was not committed in the course of strike activity.[9]

As previously noted, the striker misconduct standard applies where the GC establishes that the striker was discharged "because of alleged misconduct in the course of" the strike. *Shamrock Foods* at 1136; *Pratt Towers* at 63. The striker misconduct analysis is inapplicable to conduct not taken in the course of the strike, and the Board has no jurisdiction to review unprotected action absent a showing of unlawful motivation. *See, e.g.*, *Neptco, Inc.*, 346 NLRB 18, 21 (2005) ("Absent a

[8] Regarding Hudson, the objects of intimidation were vehicles driven on public roadways.

[9] As set forth *infra*, even if the Board properly applied the striker misconduct standard to the Conley incident, it incorrectly applied this standard.

showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason or no reason at all without running afoul of the labor laws.") (*quoting Midwest Regional Joint Board v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977)); *Yuker Constr.*, 335 NLRB 1072, 1073 (2001) (upholding employee's termination for unprotected conduct even where employer acted hastily on mistaken belief) (*citing Manimark Corp. v. NLRB*, 7 F.3d 547, 552 (6th Cir. 1993) (employer may discharge employee for any reason, whether or not it is just, as long as it is not for protected activity).[10]

The Board erred in analyzing Hudson's conduct in blocking and cutting off Conley as though it occurred in the course of the strike, as it is uncontested that this conduct: a) occurred approximately three miles and in the opposite direction from the Rutledge facility and the corporate office Hudson and Weaver allegedly intended to picket; and b) was not near a picket line. Tr. 153-54, 769-76, 796-99.

The Board found that Hudson and Weaver were engaged in strike activity because they claimed to have "followed" Conley in order to determine whether he was going to perform bargaining unit work at a commercial site so that the Union could decide whether to picket that worksite (i.e., ambulatory picketing).

[10] While the Complaint asserts that Consolidated disciplined the employees because they engaged in the strike (*i.e.*, because of anti-union animus), the GC did not adduce any evidence, and none is relied on in the decision, supporting the allegation. In any event, there is no evidence distinguishing the Disciplined Employees from the other striking employees other than the misconduct in which they engaged.

Bd.-Ord. 12. This finding was reached despite Hudson and Weaver both admitting, and the Board finding, that the incident occurred while they were in front of Conley and Diggs. Bd.-Ord. 8, 9; Tr. 614-15, 657-58, 661, 778-780, 851. Indeed, the Board's Order recognized it was "peculiar that Hudson and Weaver would get ahead of Conley if they were following him to a worksite." Bd.-Ord. 12.

The Board's conclusion that Hudson was engaged in ambulatory picketing. notwithstanding its finding that she was in front of Conley, simply cannot be squared with the record evidence or applicable law. By legal definition, Hudson's and Weaver's conduct could constitute protected ambulatory picketing only if they were following Conley as he was going to a corporate location. *See, e.g., Nations Rent, Inc.*, 342 NLRB 179, 188 (2004) ("Ambulatory picketing was also conducted by two full-time staff organizers who followed Respondent's trucks from the facility to jobsites.") (emphasis added)); *NLRB v. Teamsters Local 115*, No. 93-3195, 1995 WL 853551, at *3 n.7 (3d Cir. Jan. 13, 1995) "Ambulatory picketing – the following of a replacement worker or nonstriking employee to a customer's location and establishing temporary picket lines while replacement worker or non-striking employee performs his/her duties."). Again, Hudson and Weaver clearly were not following Conley by driving in front of him. Indeed, when Conley turned off Highway 16, neither Hudson nor Weaver followed Conley to the corporate site.

Tr. 663, 839.[11] The record lacks any reasonable explanation for how Hudson and Weaver passing and driving in front of Conley would constitute strike activity.

The Board's attempt to justify the conclusion that Hudson's conduct was strike activity by asserting that "they were keeping track of [Conley] in their rear view mirrors" (Bd.-Ord. 12) is irrational and nonsensical. Obviously, following someone by being in front of him is fraught with problems, including that one could not effectively carry out ambulatory picketing if in fact Conley turned off the road (as he did). Moreover, it was factually incorrect to conclude that Hudson and Weaver were "keeping track" of Conley, as their testimony conflicted as to where Conley turned off by a full mile (as demonstrated by Google Maps and judicially noticed by the ALJ). *See* Tr. 668, 780-81; *see also* JT-Ex. 9(b); GC-Ex. 10(c); R-Ex. 6; Bd.-Ord. 8 n.14. Even if they were "keeping track," this does not transform the conduct into strike activity.

Decisions cited in the Order purportedly supporting the finding that this conduct was protected strike activity (Bd.-Ord. 12) are inapposite because the allegations in those cases relate to the following of non-strikers. *See Otsego Ski-Club*, 217 NLRB 408, 413 (1975) (strikers "followed in [striker's] car, honking the

[11] It is likewise implausible that once Conley pulled off, both Hudson and Weaver, without communication between them, purportedly decided simultaneously their mission to determine whether he was going to a corporate site was over, and returned back the way they came without ever determining the location of Conley's jobsite and whether it was a corporate location.

horn"); *Consolidated Supply Co., Inc.*, 192 NLRB 982, 989 (1971) ("There were some incidents in which Kirk is claimed . . . to have threatened their safety by following the trucks in a dangerous manner."); *Gibraltar Sprocket Co.*, 241 NLRB 501, 509 (1979) ("LaVere went with VanDenBerghe in the car that followed Burns."); *Federal Prescription Serv., Inc.*, 203 NLRB 975, 976 n.4 (1973), *enf'd as modified* 496 F.2d 813 (8th Cir. 1974) (case involved "car-following incidents"; on review, Eighth Circuit held that car-following incidents provided a justifiable basis to deny their reinstatement).

As it is undisputed that Hudson and Weaver were in front of Conley, they were not engaged in ambulatory picketing, and the conduct is not protected strike activity. Claiming that conduct directed at a co-worker is "strike activity" because it took place during the pendency of a strike cannot convert that misconduct into protected strike activity. This Court should not sanction the Board's attempt to expand protection to activities that clearly are not, in the words of the Board, anything "other than peaceful picketing and persuasion." Intentionally impeding someone's progress on a public highway simply is not strike activity and "peaceful picketing and persuasion."

Hudson's conduct towards Conley and Diggs was not strike activity, and the GC adduced no evidence to satisfy its burden of demonstrating that Consolidated terminated Hudson on the basis of anti-union animus. It thus was error to overturn

Hudson's termination, which was lawful given her unprotected actions. *See, e.g.*, *Neptco* at 21; *Yuker Constr.* at 1073. Indeed, this Court and the Board have recognized that where a termination decision is made on the basis of unprotected activity, it has no right to determine the level of discipline an employer issues to an employee. *See, e.g.*, *Midwest Reg. Joint Bd.* at 440 ("The decision of what type of disciplinary action to impose is fundamentally a management function."); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 531 (2007) ("(T)he Board will not second-guess an employer's efforts to provide its employees with a safe workplace, especially where threatening behavior is involved."); *Prudential Protective Servs., LLC*, 2013 NLRB LEXIS 656, at *43-44 (NLRB Div. of Judges Oct. 17, 2013) ("It is well settled that the Board does not substitute its own judgment for the employers as to what discipline would be appropriate.") (*citing George Mee Mem'l Hosp.*, 348 NLRB 327, 322 (2006)).

2. Consolidated Asserts That The Inquiry As To Hudson's Termination Should End With The Conclusion That Her Conduct Towards Conley and Diggs Was Not Strike Activity. However, Even If The Board Properly Found That The Striker Misconduct Standard Applies To The Conley Incident, The ALJ's Analysis, Adopted By The Board, Is Riddled With Numerous Factual And Legal Errors Warranting Non-enforcement.

Even if the Board properly found that the striker misconduct standard applies to the Conley incident, the findings and conclusions regarding the Conley incident were not supported by substantial evidence or law but were based on

improper disregard of evidence and injection of hypotheses with no evidentiary support.

a. ***The Board Erroneously Misapplied The Burden Of Proof By Resolving Ambiguities Against Consolidated After Finding (Or "Assuming") Consolidated Had An Honest Belief.***

As set forth in Section VII.B, if an employer establishes an honest belief, the burden shifts to the GC to show that either no misconduct occurred or that whatever misconduct did occur was not sufficiently serious to warrant a discharge. Here, the ALJ "assumed" that Consolidated had an honest belief. Bd.-Ord. 12. Thus, the burden of proof should have shifted to the GC. However, after finding that Hudson did prevent Conley from passing her (Bd.-Ord. 8), the ALJ explicitly ruled (and the Board adopted) "that any ambiguity" as to whether her misconduct "was serious enough to forfeit protection of the Act should be resolved against the Respondent." Bd.-Ord. 13 (emphasis added).

This ruling constitutes an erroneous application of the burden of proof. Obviously, resolving ambiguities against the Respondent is the opposite of placing the burden on the GC. Indeed, it directly contradicts Board precedent making clear that where there is a lack of evidence on the issue of the seriousness of the misconduct, "it must be resolved in favor of the employer, because the General Counsel has the burden of proof on this question." *Axelson* at 864; *see also*

Schreiber Mfg. at 416. This failure to properly apply the established law to the facts is alone sufficient to deny enforcement of the Board's Order. *Tradesmen Int'l* at 1141.

b. *The Board Improperly Required Violence Or Threatened Violence In Determining If The Misconduct Was Serious Enough To Lose Protection Of The Act.*

In addition to erroneously shifting the burden of proof, the ALJ opined at the beginning of the hearing that strike lines are "supposed" to be intimidating to employees attempting to cross them. Tr. 150-51. As is obvious from a review of the Order, this incorrect statement of law directly impacted and permeated the ALJ's conclusions subsequently adopted by the Board. Contrary to this erroneous position, it is well-established that an employer may lawfully discharge a striker whose conduct, under all circumstances, would reasonably coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings* at 1046. This means that strikers do not have the right "to engage in [anything] other than peaceful picketing and persuasion." *Id.* at 1047. Thus, the Board has expressly held that strike lines are not supposed to be intimidating and that an employer is within its rights to discharge strikers who engage in conduct that would reasonably intimidate or coerce employees.

Here, the Board reasoned that the occasions in which strikers have forfeited protection of the Act "in almost all cases involve violent acts or threats of violent

acts" and then required either violence or a threat of violence to have occurred. Bd.-Ord. 13. The Board's requirement of violence or threatened violence is inconsistent with its own established law and warrants non-enforcement. Notably, all of the cases cited in the Order involving violence were decided prior to the Board's clear pronouncements in *Clear Pine Mouldings*.

Importantly, *Clear Pine Mouldings* rejected the earlier "per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, … '[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker.'" *Id.* (citation omitted). Indeed, behavior that may seem "relatively innocuous" may nevertheless justify discharge or discipline if it may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. *See GSM, Inc.*, 284 NLRB 174, 174-75 (1987).

Surprisingly, the Order cites *Clear Pine Mouldings* in support of its violence requirement. Bd.-Ord. 13. While the conduct in the *Clear Pine Mouldings* case involved threats of violence, nowhere in that decision did the Board require threatened or actual violence. Indeed, the Board stated that strikers have no right to block access to an employer's premises, 268 NLRB at 1047, which, while intimidating, is not necessarily a violent act or a threat of violence. *Detroit Newspapers*, 340 NLRB 1019 (2003), also cited by the Board (Bd.-Ord. 13),

upheld the discharge of a striker who caused a mere $20 in damage to a newspaper rack. Even though it was not "violent" behavior, the Board found that this conduct forfeited protection of the Act. *Id.* at 1027-30.

Nothing in the law requires that misconduct be violent in order to forfeit protection of the Act. Indeed, this Court has recognized that in the discipline of employees engaging in protected concerted activity (such as strikes), "there have been scores of cases over the years in which employers have lawfully disciplined employees for misconduct short of that which is flagrant, violent, or extreme." *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 215 n.5 (D.C. Cir. 1996). Thus, the Board's violence requirement is completely contrary to this Court's holding in *Aroostook*. The Board has been previously criticized for attempting to shield far too much misconduct within the protection of the Act, as it has done here. *See Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 405 (8th Cir. 1996) ("We have refused to enforce Board orders based on the unreasonable and arbitrary conclusion that the employee's misconduct should be protected under Section 7. The Board seeks to exercise its discretion by cutting a wide swath for permissible misconduct occurring in connection with any sort of concerted activity . . . . The Board's conception of 'leeway' for misconduct is far too blunt an instrument when applied without regard to the situation in which the misconduct took place.")

(citations omitted). This Court should refuse to enforce the Board's Order for the same reason.

Not only does the violence requirement contradict this Court's direct statement, it is inconsistent with the Board's own well-established pronouncements that nonviolent conduct can lose protection of the Act. *See Detroit Newspapers* at 1030 (upholding discharge of a striker who caused a mere $20 in damage to newspaper rack); *Service Employees Int'l Union Local 525*, 329 NLRB 638 (1999) ("nonviolent conduct, including efforts to prevent employees from reporting to work by impeding access to an employer's facility also is proscribed"); *Electrical Workers Local 3 (Cablevision)*, 312 NLRB 487 (1993) (driving vehicles slowly in the vicinity of an entrance to obstruct passage coerces employees); *Meat Packers*, 287 NLRB 720, 721 (1987) ("It matters little that there were no incidents of actual physical violence and property damage or that the protesters did not effectively prevent individuals from passing through their midst.") (concluding that massing a crowd and confronting and insulting rivals during strike "would reasonably tend to coerce and threaten employees from engaging in protected activities"); *Carpenters, Metro District of Philadelphia (Reeves, Inc.)*, 281 NLRB 493, 497 (1986) (blocking ingress and egress coerces employees whether the blocking actually prevents passage or merely delays it); *Metal Polishers*, 200 NLRB 335, 336 n.10 (1972) (finding that blocking cars in which nonstriking employees were seeking to

enter the gates to the plant interfered with the employees' exercise of their rights; "[t]he absence of physical violence does not lessen the restraining effect").

The Board expressly relied on the conclusion that Hudson did not engage in violence in finding that the Conley and Rankin incidents did not justify discharge. *See* Bd.-Ord. 9 (As to Conley incident, "neither Hudson nor Weaver committed an act of violence."); Bd.-Ord. 10 ("The record establishes that neither Hudson nor Weaver committed any act of workplace violence regarding Rankin."); *see also* Bd.-Ord. 12-13.[12] The Board's injection of an improper requirement, i.e., violence, which is contrary to both its own decisions and this Court's interpretation of the Act, warrants non-enforcement. *Tradesmen Int'l* at 1141; *see also Moore Bus. Forms*, 574 F.2d 835, 843 (5th Cir. 1978) ("Obviously, if the order is based on an invalid legal reason it will not be enforced.").

c. *The Board's Findings, Including The ALJ's Egregious Error In Finding Conley Not Credible Because He Was A Manager, Are Based On Unwarranted Assumptions That Are Not Supported By Substantial Evidence.*

Although the foregoing presents numerous legal reasons for not enforcing the conclusion that Consolidated violated the Act in terminating Hudson, a Board order should not be enforced where its findings are not supported by substantial evidence. *Tradesmen Int'l* at 1141. Here, many of the Board's key findings are

[12] The Board similarly engaged in a violence analysis as to Maxwell's and Williamson's conduct. See Bd.-Ord. 4, 13.

not supported by substantial evidence and, indeed, are not supported by any evidence whatsoever.

Further, and similar to another Board order not enforced by this Court, the Board improperly "treated conflicting evidence … with an almost breathtaking lack of evenhandedness. The employer's witnesses saw their testimony completely disregarded for the slightest of immaterial inconsistencies, while the union's witnesses survived even material contradictions." *Sutter East Bay Hosps. v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012). "As the Supreme Court has explained, the Board 'is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.'" *Id.* (*citing Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998)).

i. *The ALJ Found That Conley Was Biased Because He Was A Manager.*

Without any supporting record evidence, in analyzing Conley's testimony, the Board operated under the assumption that he was biased and unreliable because he is a Company manager. Bd.-Ord. 7. ("Conley is a manager who understands that his employer terminated Hudson . . . and this his employer would very much like [her] to remain terminated.") While this assumption is never appropriate, it is also belied by the fact that Conley never testified that he understood or even thought "that his employer would very much like them to remain terminated." The far-reaching implications of finding that a manager's credibility is impacted simply

because of his status as a manager should not be lost on this Court. Indeed, such a presumption would effectively violate employers' due process rights to a fair and impartial proceeding by making it virtually impossible to uphold a challenged termination in employment lawsuits where the manager's testimony would be key to establishing the lawful reasons for adverse employment actions.

ii. *The ALJ Found, Without Any Support, That Conley Was Likely To Have Been Angry.*

Without any supporting evidence, in analyzing his testimony, the Board found that Conley was "likely to have been angry about the fact that Hudson and Weaver were following him." Bd.-Ord. 7. Again, it is improper to make this finding without evidence. The only question regarding anger was when the GC asked Diggs whether Conley was angry during the incident, and Diggs responded that "I don't remember [Conley] getting mad." Tr. 965.[13] Thus, this finding is not only without evidence, it is actually contrary to the only record evidence.

[13] While the Board attempted to distance itself from the ALJ's clearly improper conclusions regarding Conley by stating it was not going to speculate what might have motivated Conley's testimony (Bd.-Ord. 1 n.2), the Board did not reject or amend the ALJ's findings as to Conley in any way. The ALJ's unsupported presumptions of bias by Conley were a vital aspect of the ALJ's decision adopted by the Board. Thus, the Board's attempted detachment from the ALJ's improper determinations as to witness motivations did not and cannot cure the defects.

iii. *The Board Improperly Found That Conley's And Diggs' Testimony Was Self-Serving.*

The Board also discredited Conley's and Diggs' testimony as self-serving. Bd.-Ord. 7. Again, the Board gave no explanation for and cited no evidence in support of the finding that their testimony was self-serving. Indeed, no evidence was adduced that Diggs and Conley had any self-interest in the matter.[14]

iv. *The Board Imposed A Duty to Escape That Does Not Exist.*

Rather than focusing on the proper inquiry of whether misconduct occurred and whether the misconduct that occurred reasonably tended to coerce or intimidate employees in the exercise of their Section 7 rights, the Order erroneously focused on what efforts the targets- specifically Conley and Rankin- took to avoid the incidents. As to the Conley incident, the Board found that Conley could have passed Weaver after she passed him prior to Hudson's approach and emphasized on multiple occasions that he could have avoided being boxed in or traveling behind Hudson and Weaver by turning onto other roads. *See* Bd.-Ord. 9-11.

[14] Consistent with its failure to find Company witnesses credible based upon unfounded assumptions, the Board rejected Greider's and Rich's testimony on the ground that it was "solely the result of their animus towards Hudson, arising at least in part from the strike" (Bd.-Ord. 6) (emphasis added), even though no evidence supports this finding. Ironically, the Board credited the majority of Hudson's and Weaver's self-serving and unsupported accounts. Bd.-Ord. 6-8.

This reasoning perverts the striker misconduct analysis and effectively places an obligation on the objects of the misconduct (who had no reason to know that they would be harassed) to have made decisions the ALJ and the Board (with the benefit of hindsight) apparently would have made in an effort to lessen the impact of the conduct. It was error to give any weight to these findings, as the proper inquiry (if such conduct constituted strike activity) is whether the strikers engaged in misconduct that would reasonably tend to coerce or intimidate employees (*Universal Truss* at 734-35), not whether in hindsight the targeted employees could have taken steps to reduce the amount of time they were blocked and harassed.

Moreover, even if attempted escape was relevant as to whether the conduct occurred and whether it was reasonably coercive and intimidating, the uncontroverted evidence showed that all three of the targeted victims- Conley, Rankin, and Greider- altered their routes to escape from Hudson. Tr. 467, 470-71, 867-68, 958-59, 1055; R-Ex. 6. Accordingly, the evidence of escape, if relevant, supports a finding that Hudson's conduct was intimidating and coercive because it actually caused these employees to alter their driving routes.

v. *The Board Improperly Imposed A Duty To Report To The Police.*

The Board erroneously placed a duty on the targets to have reported the incidents to the police in order to find that they occurred. *See* Bd.-Ord. 6, 8, 10,

11. However, there is no such legal requirement. The Board itself stated, "the Act does not require that employees exercising their right to refuse to support the strike enlist the assistance of the police to gain access to and from the plant." *Local #1150, United Elec., Radio & Mac. Workers*, 84 NLRB 972, 975 (1949). The imposition of this requirement directly led to the ALJ reaching conclusions against Consolidated. Specifically, he "credit[ed] Hudson and Weaver that they did not block Conley in for any significant distance or period of time" based on the "major reason" that "Conley did not bother to report this incident to the police as he had been instructed." Bd.-Ord. 8.

The finding that employees were obligated to report strike incidents to the police is not supported by substantial evidence. Subsequent to the Huffmaster strike meeting with employees, Consolidated emailed Illinois non-bargaining unit employees (including Conley, Redfern, Greider, and Rankin), enclosing Huffmaster's guidelines and including the following instruction: "Report any incidents to the Command Center at [phone number]." Tr. 180-81, 486; GC-Ex. 20. Thus, the specific instruction to the non-striking employees was to report incidents to Consolidated's Command Center rather than the police. GC-Ex. 20; *see also* Tr. 1216 (first step in addressing strike misconduct was to call Command Center and complete incident report).

The Huffmaster generic written procedures, GC-Ex. 21 (entitled "procedures" as opposed to "instructions" as characterized by the Board), relied upon by the Board (Bd.-Ord. 4-5) are at best ambiguous. The statement that an employee should report the incidents to the police is buried in the generic guidelines, along with contradictory guidance that if any employee is threatened at work, he/she should "notify security personnel and complete an incident report." GC-Ex. 21. Thus, at most, the inconsistent guidance from the documents is overruled by specific instructions in the email. To the extent any ambiguity reasonably could be found, it should have been resolved in Consolidated's favor. *Axelson* at 864; *see also Schreiber Mfg.* at 416.

The Board cannot simply disregard "whatever in the record fairly detract[s] from its determination." *Clock Electric v. NLRB*, 162 F.3d 907, 914 (6th Cir. 1998). It did just that when it disregarded the undisputed instructions given by Consolidated to employees to report incidents to the Command Center. Further, the imposition of a requirement to report striker misconduct to the police is inconsistent with established law. Given that the failure to file police reports was a significant reason (indeed, a "major reason" and "very significant" in the case of the Conley incident) (Bd.-Ord. 8), for finding that the incidents involving Hudson did not occur, the determination should be overturned.

vi. *The Board Made Unsupported And Unwarranted Hypotheses.*

The Board also made unsupported and unwarranted hypotheses regarding the Conley incident. While agreeing that: 1) Hudson and Weaver slowed down while driving in front of Conley; and 2) Hudson impeded Conley's progress, the Board suggested that Weaver and Hudson may have slowed down due to a change in the speed limit on the road. Bd.-Ord. 7-8. This is based on nothing but pure speculation, as no evidence supports this hypothesis. Finally, the incorrect finding that Diggs purportedly conceded that Weaver and Hudson may have been driving at the speed limit was given "probative value." Bd.-Ord. 9. Contrary to this finding, Diggs testified that he did not know what the speed limit was (unsurprising given that he had been to the Mattoon area twice in his life) and that Hudson and Weaver "were traveling much slower than everyone else was traveling[.]" Tr. 954, 965.

The above demonstrates that the Board ignored or discounted sworn testimony based on nothing more than unproven assumptions and bias. It improperly disregarded "whatever in the record fairly detract[ed] from its determination." *Clock Electric* at 914. Without substantial evidence or legal authority in support, the Board improperly disregarded the bulk of the evidence and substituted its own judgment to create the outcome it desired. *Id.* Where a hearing officer shows "utter disregard" for sworn testimony, the court has the

authority to overturn an improper determination. *See E.N. Bisso and Son, Inc. v. NLRB*, 84 F.3d 1443 (D.C. Cir. 1983). The improper disregard of testimony, unsupported assumptions, and unsupported factual findings that were contrary to the record evidence all contributed to the finding that Hudson's conduct provided no justification for her discharge. Bd.-Ord. 7-9. These findings were not supported by substantial evidence and, accordingly, the Order must not be enforced. *Tradesmen Int'l* at 1141; *see also Sutter East Bay Hosps.* at 437 (to receive deference, Board's findings "must be supported by substantial evidence on the record[;]" noting the troubling nature of the lack of evenhanded treatment of evidence).

d. *The Board Erred in Determining that Hudson's Conduct Was Insufficiently Serious.*

Assuming it was properly determined to be strike activity in the first place, the Board erred in ruling that Hudson's conduct towards Conley was not sufficiently serious to justify termination, particularly given that it occurred on a public highway and posed a safety risk to Conley and others. Common sense dictates that swerving in front of cars and impeding their progress as they are

attempting to pass compromises the safety of others and tends to coerce or intimidate.[15]

Conduct similar to that committed by Hudson has been recognized to be sufficiently serious to warrant discharge, and indeed the impeding alone is sufficient to find that the Board did not carry its burden. *See Moore Bus. Forms* at 843 (in finding that company lawfully terminated employee, Fifth Circuit held that striker "had no right to accost, pursue, block or otherwise interfere with any right of citizen in the use of the public highway while attempting peaceably and lawfully to go to work"); s*ee also NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 755 (7th Cir. 1998) ("(O)therwise protected activity surely loses its protection when it compromises the safety of others."); *Teamsters Local 115*, 1995 WL 853551, at *23 ("[r]eckless driving has been held to be an implicit threat of bodily harm, in violation of" the Act."); *Intern'l Paper Co.*, 309 NLRB 31, 36 (1992) (discharge of striker upheld where he engaged in cat and mouse game on public highway with replacement employees); *Teamsters Local 812* (*Pepsi-Cola Newburgh)*, 304 NLRB 111, 117 (1991) (union violated Act through picketer interfering with driver of company vehicle on highway).

[15] Chief Branson added that the stop-and-go driving on a public road is harassment which makes "an unsafe condition on the roadway" that the police "don't allow … under any condition." Tr. 576.

e. *The Board Erred In Requiring All Incidents To Have Occurred.*

Although it found that she engaged in misconduct by blocking Conley, in resolving the "ambiguity" against Consolidated as to whether her conduct was sufficiently serious to forfeit the Act's protection, the Board apparently required all three alleged incidents committed by Hudson to have occurred in order to uphold the termination. *See* Bd.-Ord. 13. While Consolidated asserts that it was error to find that Hudson did not commit misconduct during the Rankin and Greider incidents, if Hudson engaged in misconduct towards Conley that lost protection of the Act (assuming the conduct committed during the Conley incident was strike activity in the first place), this was sufficient standing alone to justify termination, regardless of whether the other two incidents occurred. *See Moore Bus. Forms* at 844 (refusing to enforce Board's order to reinstate discharged striker where one of five separate incidents was sufficiently serious to warrant discharge); *Roto Rooter*, 283 NLRB 771, 772 (1987) (after finding two of five incidents of striker misconduct did not occur, the Board considered remaining three incidents and found that encounters taken as whole reasonably tended to coerce or intimidate the non-striking employees and thus held that employer's refusal to reinstate employee following strike was lawful); *see also Schreiber Mfg.* at 416 ("The ultimate burden of proof was on the [GC] to show either that no misconduct occurred or that

whatever misconduct did occur was not sufficiently serious to warrant a discharge.")

3. The Findings Regarding The Rankin Incident Were Not Supported By Substantial Evidence.

Although the Conley incident is sufficient to justify Hudson's termination, the Rankin incident further supports termination. As described below, Hudson clearly engaged in misconduct that forfeited the Act's protection.

a. *The Board's Finding That Hudson Did Not Engage In Misconduct Is Based Upon Unsupported Assumptions Of Witness Motivations And An Incorrect Analysis Of The Neutral Witness Testimony.*

As to this incident, six people testified: Rankin, Hudson, and Weaver and neutral witnesses Rich, Dasenbrock, and Walters, who observed the incident from the Rutledge building's second floor. *See supra* § IV.C.2. The GC did not call striker Neunaber, who Hudson and Weaver testified was in Hudson's car during the incident. Tr. 620, 786-89. Critically, and similar to its treatment described above, the Board, without any evidentiary support, found that Rich and Walters were biased because they were "upset" about the strike. Bd.-Ord. 6, 10 (with no citations to the record). The ALJ also discredited the neutral employee witnesses because the incident did not "affect them personally." Bd.-Ord. 10. If true (i.e., that it did not "affect them personally"), this is actually a reason to credit their

objective testimony versus the self-serving and otherwise unsupported accounts of Hudson and Weaver.

The Board further erred in finding and giving weight to any purported inconsistencies in the neutral witnesses' testimony. *Id.* Rather, the record evidence demonstrates that none of their testimony is materially inconsistent, as all testified that Hudson impeded Rankin's progress and that she attempted to block his path. Tr. 1028, 1032, 1122-24, 1134, 1165, 1179-1181, 1183, 1195, 1198.[16] Further, their testimony was discarded because they were not identified or interviewed contemporaneously with the occurrence of the incident (Bd.-Ord. 10), even though no evidence exists that Rankin knew that they viewed the incident or that their truthfulness and memories were impacted.

Additionally, the Board made factual assumptions without any support. The Board's finding that Hudson drove very slowly because of parked cars and people in the street rather than to harass Rankin (Bd.-Ord. 10) disregarded Hudson's express admission there was nothing in front of her (Tr. 842-43), which is consistent with witnesses' testimony that they did not see anything in front of her car and that there was no reason for her to drive so slowly. Tr. 484, 1166, 1182-83. Further, without evidence, the Board improperly found that "(a)ssuming

[16] Without explanation, the Board failed to analyze Weaver's and Hudson's contradictory testimony in that Hudson claimed that there was not a ditch in the vicinity of the Rankin incident, while Weaver testified that the ditches "were really muddy." Tr. 623-25, 790.

Hudson's car moved laterally there is no basis for concluding she did so to harass Rankin[,]" and that "(i)t is just as likely that she did so to avoid hitting cars, people or in reaction to the truck coming towards her from the north." Bd.-Ord. 10. The ALJ (and the Board, through its adoption) essentially rationalized Hudson's conduct based on their own theories of what could have happened. But, the theories are contrary to the record evidence. Four witnesses, including three non-supervisory witnesses, testified that Hudson blocked Rankin from passing on her left. The hypothetical that Hudson could have been moving laterally to avoid hitting cars or people is unsupported. Clearly, the GC did not carry its burden through the ALJ's unsupported hypotheses.

As with the Conley incident, in finding that Hudson did not commit any act of workplace violence, the Board relied "in part of the fact that no police reports were filed." Bd.-Ord. 10. As stated above, requiring both an act of violence and the victim to have filed a police report are inappropriate grounds for finding that misconduct did not occur.

Finally, similar to the Conley analysis, the Board created an improper duty to escape. *See* Bd.-Ord. 9 ("There is no evidence that Rankin could not have turned into the Pilson's lot and cut through to Landlake Boulevard as Greider had done."). This is contrary to the law and belied by the evidence, as Rankin testified that he considered taking the first left into Pilson's but could not do so because a

car was coming out of its parking lot and that both entrances were blocked and therefore not viable exits. Tr. 467, 481-82; JT-Ex. 7(a).

b. *Hudson's Conduct Towards Rankin Lost Protection*.

Hudson's conduct towards Rankin was serious strike misconduct which forfeited protection of the Act, as similar conduct has long been recognized as reasonably tending to coerce and intimidate employees in the exercise of their rights.[17] *See Capital Bakers Div. of Stroehmann Bros.*, 271 NLRB 578 (1984) (blocking truck's exit from employer's facility sufficient to warrant discharge for strike line misconduct, as it tends to coerce or intimidate); *see also Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328, 1336 (1993) (union violated Act by preventing car from entering employer's plant); *Teamsters Local 812* at 115-17 (holding that "blocking of vehicles by picketers violates the Act" and union violated Act through picketer driving in front of company vehicle and braking unsafely); *Teledyne Indus., Inc.*, 295 NLRB 161, 174-75 (1989) (upholding denial of reinstatement to striker in part due to blocking of nonstriker vehicle); *Carpenters, Metro Dist. Council Of Philadelphia (Reeves, Inc.)*, 281 NLRB 493, 497-98 (1986) (union violated Act through acts of picketers blocking the ingress of employees); *United Steelworkers of Am. (Oregon Steel Mills, Inc.)*, 2000 NLRB

[17] In fact, the Board noted that starting and stopping in cars is "clearly illegal" (Bd.-Ord. 10), and Rankin testified he did feel totally vulnerable and threatened. Tr. 474-75.

LEXIS 495, at *77 (NLRB Div. of Judges Aug. 2, 2000) ("Blocking ingress and egress coerces employees whether the blocking actually prevents passage or merely delays it.").

4. The Board's Conclusion That Hudson Committed No Misconduct As To Greider Was Not Supported By Substantial Evidence.

Regarding the Greider incident, the GC presented no proof that the blockade did not occur. Hudson and Weaver did not remember anything (Tr. 601-02, 768), and the GC did not call a single independent witness from the picket line, despite the presence of many strikers during the incident. R-Ex. 1 at 10:03:41. As opposed to the GC's approach of calling no witnesses, Consolidated called Greider and Hudson's friend Rich, who viewed the incident from the second floor of the Rutledge building while working. Tr. 1116-18. Rich testified that Hudson barely moved in front of Greider and that she sent a text message to Greider within minutes of viewing the incident, saying that "I just saw what Pat Hudson did to you. I can't believe she did that[.]" Tr. 1059, 1118-22, 1167.

Rather than considering the GC's failure to put on any evidence that the misconduct did not occur, without any supporting evidence or explanation, the ALJ (and the Board, via adoption) improperly rejected Greider's and Rich's testimony as "solely the result on [sic] their animus towards Hudson, arising at least in part from the strike." Bd.-Ord. 6. There is absolutely no evidence that Greider and

Rich had any animosity towards Hudson. In fact, Greider specifically denied any animosity (Tr. 1086), and Rich testified that she and Hudson are friends and that Hudson attended her wedding. Tr. 1116.

Moreover, as with the Conley and Rankin incidents, in finding that Hudson did not commit misconduct regarding Greider, the Board inappropriately relied on the fact that Greider did not file a police report, which, as noted above, is contrary to both the law and facts of the case, and disregards the fact that Greider indisputably reported the incident in-person to the Command Center that very day. Bd.-Ord. 6; Tr. 1062-63.

The finding that Hudson engaged in no misconduct towards Greider was not based on substantial evidence but instead was based on an improper disregard of testimony, a failure to hold the GC to its burden of proof, and unsupported assumptions. As the GC did not carry its burden, the Order must not be enforced.

As with her conduct towards Rankin, Hudson's conduct towards Greider is sufficient to lose protection of the Act. *See* caselaw cited *supra* § VII.C.3.b.

D. The Board's Conclusion That Williamson's Suspension Violated The Act Is Not Supported By Substantial Evidence Or Law

1. Williamson's Conduct In Grabbing His Crotch At A Nonstriking Employee In A Hostile Manner Justifies His Two-Day Suspension.

The Board found that Williamson engaged in misconduct by grabbing his crotch as a hostile gesture and yelling the word "scab" at Walters after she crossed

the picket line to perform her job. Bd.-Ord. 11. Thus, the burden shifted to the GC to show that the misconduct was not serious enough to forfeit the protection of the Act. In apparently finding that the GC met this burden, the Board concluded that "for a striking employee to forfeit the protection of the Act, an implied threat of bodily harm must accompany a vulgar or obscene gesture." Bd.-Ord. 13. The Board then found that "Williamson's gesture certainly does not meet this standard." *Id.* Again, the Board inferred a legal standard of violence that does not exist in lieu of applying the proper standard, which is whether the misconduct reasonably would tend to coerce or intimidate an employee from exercising Section 7 rights. Behavior such as Williamson's toward Walters has been held sufficiently serious to warrant discipline. *See Universal Truss* at 780-81 (upholding termination of striker that made sexually suggestive dance towards female employee); *see also Romal Iron Works Corp.,* 285 NLRB 1178, 1182 (1987) (subjecting employees to gross vulgarisms because they are engaged in activities protected by the Act directly inhibits them in the exercise of those rights). Indeed, behavior that may even seem "relatively innocuous" may justify discharge if it may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. *See GSM* at 174-75. Here, the Company issued Williamson only a two-day suspension, which is clearly lawful given that the Company would have been justified in terminating him.

2. It Was Clear Error To Shift The Burden To Consolidated In A Striker Misconduct Case.

The Board held that "even assuming that Williamson's conduct [in the Walters incident] forfeited the protection of the Act . . . it is Respondent's burden under the *Wright Line* doctrine to establish that it would have suspended Williamson solely on the basis of the Tara Walters incident." Bd.-Ord. 13. It was plain error to apply the *Wright Line* test to shift the burden to Consolidated. The *Wright Line* test has been held inapplicable to striker misconduct (*see Shamrock Foods* at 1136; *Siemens Energy & Automoation, Inc.*, 328 NLRB 1175 (1999)) and is completely inconsistent with the burden of proof structure in striker misconduct cases. The Board's improper shifting of the burden of proof is an additional reason the Order must not be enforced.

3. Williamson's Attempt To Intimidate Redfern Further Justifies His Two-Day Suspension.

Williamson's conduct in intentionally engaging in the acts that resulted in Redfern's car mirror being knocked in further justifies his suspension. Williamson admitted he intentionally approached Redfern's vehicle as she pulled out of the parking lot, claiming he wanted to make sure she saw his sign. *See* Tr. 717, 748-50; R-Ex. 5. Williamson also admitted that he was close to cars all day. Tr. 743.

As discussed *supra*, Redfern drove out of the facility very slowly, and Williamson came into contact with her vehicle with sufficient force to smack her

mirror in. The GC did not call any of the strikers present during the Redfern incident to rebut this testimony. Tr. 987; R-Ex. 1 at 5:08:07. The Board found that "there is no evidence that Williamson intentionally 'struck' Redfern's mirror." Bd.-Ord. 11. Under Board precedent, that is not the proper question; rather, the question is whether Williamson engaged in misconduct that would reasonably coerce or intimidate an employee in the exercise of her rights.

Further, a finding that Williamson did not intentionally engage in conduct that resulted in him striking Redfern's mirror with enough force to fold it in is not supported by substantial evidence and, indeed, is contrary to the evidence. Williamson's version is entitled to no credibility, as the ALJ refused to credit his denial in the Walters incident, and his story- which he never told Consolidated until the hearing (not surprisingly given its absurdity) (Tr. 1243) - that his whistle caused the mirror to pop in (Tr. 717-18, 740-42), is too absurd to be believed.

Williamson's conduct was sufficiently serious to warrant a two-day suspension. *See Siemens* at 1176 (upholding discharge of striker that kicked a vehicle passing through picket line); *GSM* at 174-75 (in upholding discharge of strikers making intentional contact with non-strikers' vehicles, finding that "(c)onduct such as kicking, slapping, and throwing beer cans at moving vehicles is intimidating enough in and of itself" to forfeit protection of the Act); *see also Auto Workers Local 695* at 1336 (1993) (union violated Act where picketers broke

vehicle mirrors); *Teamsters Local 812* at 115-17 (union violated Act through picketer bending mirror). Even if Williamson only crowded Redfern's car as she exited the facility, such conduct was reckless and would reasonably tend to coerce or intimidate because it reasonably could lead to the type of incident that occurred here. *See Calmat Co.*, 326 NLRB 130, 135 (1998) (upholding discharge of striker hit by exiting vehicle that intentionally placed himself in front of car).

E. The Board Erred In Finding That Maxwell's Suspension Violated The Act.

1. The Board Improperly Credited Maxwell's Account Based Upon The Clearly Erroneous Finding That Fetchak's Testimony "Did Not Contradict Maxwell's Testimony In Any Material Way."

The reason the Board credited Maxwell's testimony that he did not intentionally strike Flood's vehicle and did not threaten and intimidate Flood was its finding that passenger Fetchak's account did "not contradict Maxwell's testimony in any material way." Bd.-Ord. 4 n.5. The record evidence shows, however, that Fetchak's testimony does materially contradict Maxwell's testimony. Initially, and significantly, Maxwell and Fetchak do agree on two points- that Maxwell: 1) was walking back and forth in the driveway when Flood approached the exit; and 2) he intentionally refused to move out of the way. Tr. 504, 511-12, 515, 929-33, 938-39, 952-53.

However, Maxwell's and Fetchak's testimony diverges on other significant points. Fetchak testified that Flood was forced to stop the vehicle and slowly inch forward a couple of inches ("almost negligible") and stop again on multiple occasions until Maxwell left the front of the van, whereas Maxwell claimed that Flood's van "took off like a bat out of hell." Tr. 499-501, 931, 938-39, 953. Further, Fetchak testified that: 1) Maxwell intentionally placed a part of his arm on the vehicle's front in an effort to impede their progress (contrary to Maxwell's claim that he put his arm to "brace" himself); and 2) Maxwell was the aggressor, contrary to Maxwell's claim that the van hit him twice. Tr. 500-01, 932-34, 952-53.[18]

There was no reason to dispute the veracity, and in fact the Board did not dispute the veracity, of Fetchak, a non-interested, non-management, subpoenaed witness employed in another state. Bd.-Ord. 3-4; Tr. 926-27. Under the burden-shifting framework, if any doubt exists between two witnesses found credible (Maxwell and Fetchak), it must be resolved against the GC, who has the burden of proof and failed to call any of the other six or more witnesses to support Maxwell's account. *See, e.g., Axelson* at 864.

[18] Interestingly, despite the fact that the Board discredited Consolidated's employees because they did not go to the police, it made no mention of the fact that Maxwell did not go to the police despite claiming to be hit by a vehicle twice that was "going like a bat out of hell" at 15 miles per hour.

2. Maxwell's Misconduct Was Not Protected.

Maxwell's misconduct was more than sufficient to justify a two-day suspension. *See Siemens* at 1176 (upholding discharge of striker that kicked a vehicle passing through picket line); *Calmat* at 135 (upholding discharge of striker hit by exciting vehicle where he "placed himself in front of the exiting vehicle by, after all the other pickets had stopped, continuing to walk purposefully in front of it, slowly, in order to cause it to slow down or stop" and subsequently approached and threatened driver); *GSM* at 174-75 (in upholding strikers' discharge, finding that "(c)onduct such as kicking, slapping, and throwing beer cans at moving vehicles is intimidating enough in and of itself" to forfeit protection of the Act); *see also Auto Workers Local 695* at 1336 (union violated Act by preventing car from entering employer's plant); *Teamsters Local 812* at 115-17 ("the blocking of vehicles by picketers violates the Act").

F. The Board Failed To Consider The Surrounding Circumstances In Evaluating The Seriousness Of Hudson's And Williamson Misconduct.

"In determining whether specific misconduct is serious enough to warrant discharge, it is appropriate to consider all of the circumstances in which the alleged misconduct occurs[.]" *Universal Truss* at 735. Here, the Board erred in failing to consider all of the circumstances in which the alleged misconduct occurred, as the

chaotic strike lines heightened the coercive and threatening impact of Hudson's and Williamson's misconduct.

As testified to by Chief Branson (a GC witness), when he arrived at the strike line on December 10, there was "chaos in the street" due to the road's congestion. Tr. 540. From the beginning of the day, Hudson participated in the chaos. She obstructed traffic coming into and out of the Rutledge facility, and despite being hit accidentally by a security guard and the general instructions she received from the police, she continued to intentionally obstruct traffic and put herself in the way of oncoming vehicles. R-Ex. 1 at 9:09:25 (hit by security guard), 10:18:26 (Police Chief had to move her back), 11:30:32; Tr. 541-42, 766-67, 802-03, 806, 810-11, 821-22, 825.

Similarly, as testified by Chief Branson, Williamson acted like a "hot head," was "over the top" in his striker activities, and was "getting as close as he possibly could to vehicles." Tr. 565-66, 577, 1111-13; R-Ex. 10(a), 10(b).

The deafening, chaotic strike line conditions and the conduct taken by the Disciplined Employees, particularly Hudson and Williamson, who indisputably crowded cars attempting to leave and enter during the strike, heightened the coercive and threatening nature of the conduct, and the Board erred in failing to heed its own directive in its Order by considering this conduct.

G. The Board Erred In Finding That Consolidated Violated Section 8(a)(5) of the Act.

The ALJ declined to rule on the Section 8(a)(5) claim and, consequently, made very few factual findings related thereto. Bd.-Ord. 11. The Board amended the ALJ's decision to include a finding of a Section 8(a)(5) violation but provided no legal analysis or findings of fact in support thereof. When the Board concludes that a violation of the Act has occurred, it must be supported by substantial evidence. *See, e.g., Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 647 (D.C. Cir. 2013). The Board's conclusion must be "rationally based on articulated facts and consistent with the Act." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980); *see also Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006) ("Without a clear presentation of the Board's reasoning, it is not possible for us [the Court] to perform our assigned reviewing function and to discern the path taken by the Board in reaching its decision.").

Here, the Board, did not articulate any evidence nor give any reasoning in support of its finding of a violation. Accordingly, the finding of a Section 8(a)(5) violation must not be enforced. *See Point Park* at 52 (reversing and vacating portion of Board order not supported by substantial evidence); *Sutter East Bay Hosps.* at 437 (holding that the Board did not meet its analytical burden by failing to provide any analysis or explanation for its conclusion).

VIII. CONCLUSION

Consolidated respectfully requests the Court grant its Petition for Review and vacate the Board's findings that it violated the Act by discharging Hudson and suspending Williamson and Maxwell and by refusing to bargain collectively with the Union and eliminating job duties of the Office Specialist position. While Consolidated asserts that the record and law dictate that this Court refuse to enforce the Board's Order in any respect, to the extent the Court finds remand necessary, Consolidated submits that this Court should direct the Board not to remand to the same ALJ (if remand is necessary) due to his demonstrated bias against Company witnesses.[19]

[19] *See, e.g.*, *CMC Electrical Construction and Maintenance, Inc.*, 347 NLRB 273 (2006) (remanding case for reassignment to new ALJ where original ALJ demonstrated bias).

Respectfully submitted, this 18th day of March, 2015.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font and Times New Roman style.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2015, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the District of Columbia using the CM/ECF system which will send notification of such filing to the following:

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